No. 14772

In the United States Court of Appeals for the Ninth Circuit

RICHARD C. LAMKIN AND ANTHONY B. SILVIA,
APPELLANTS

v.

BROWN AND ROOT, INC., PACIFIC BRIDGE COMPANY, INC., MAXON CONSTRUCTION COMPANY, INC., UTAH CONSTRUCTION COMPANY, INC., AND SWINNERTON AND WALLBERG, A CO-PARTNERSHIP, JOINT ADVENTURERS DOING BUSINESS UNDER THE NAME OF BROWN-PACIFIC-MAXON, APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF GUAM, TERRITORY OF GUAM

BRIEF FOR THE APPELLEES

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INDEX

CITATIONS

Cases:

Cases—Continued

Statutes:

Miscellaneous:

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OPINION BELOW

The opinion of the District Court, rendered orally at the hearing (R. 78-80), is not reported.

JURISDICTION

This is a suit brought by plaintiffs-appellants in the District Court of Guam, Territory of Guam, against their employers, the defendants-appellees, for the pur-

pose of enjoining appellees from complying with future levies issued by the Commissioner of Revenue and Taxation of the Government of Guam in collection of income taxes imposed by Congress in the Organic Act of Guam; for money judgment in favor of appellant Lamkin in the amount of $504.26, representing wages due Lamkin paid over by appellees to the Government of Guam in compliance with past levies; for an injunction restraining appellees from withholding in the future sums from the wages of appellants and others of their employees in payment of the income tax imposed by the Organic Act of Guam; for an accounting to appellants and other of appellees' employees for sums heretofore withheld from their wages on account of the income tax since January 1, 1951; and for money damages in favor of each appellant respectively in the sum of $25,000 by reason of alleged (R. 54) "deprivation" by appellees of appellants' "civil rights in violation of the provisions of Chapter 21, Title 42, U.S.C.A." (R. 3-10, 54-62.)

Appellant Lamkin is a citizen of Colorado and appellant Silvia of California. Both are employed on Guam by appellees who are joint adventurers engaged in the construction of military installations under contract with the United States. (R. 54.) Jurisdiction of the District Court exists by virtue of Section 22(a) of the Organic Act of Guam, c. 512, 64 Stat. 384 (48 U.S.C. 1952 ed., Sec. 1424(a)), (a) since the cause arises under the Organic Act of Guam and the Internal Revenue Codes of 1939 and 1954 and particularly involves the meaning and effect of Sections 30 and 31 of the Organic Act of Guam (48 U.S.C. 1952 ed., Sec. 1421h and 1421i) and, further (b), since this is a cause in Guam

jurisdiction over which has not been transferred by the legislature to any other court.

The instant suit was commenced by the filing of a complaint on October 28, 1954, and service of summons on October 30, 1954. (R. 68.) On February 17, 1955, the defendants-appellees filed a motion (1) to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted and (2) for summary judgment for the defendants based on the complaint and an attached affidavit. (R. 12-13.) On February 17, 1955, notice was also given that the motion would be brought on for hearing on March 4, 1955. (R. 53, 69.) On March 3, 1955, appellants filed an amended complaint. (R. 69.) A hearing on the motion was held on March 4, 1955. (R. 71-80.) The District Court granted the motion for summary judgment and directed that the appellees prepare a form for judgment. (R. 80.) On March 15, 1955, the District Court entered the judgment, which ordered, adjudged and decreed that the appellees' motion for summary judgment be granted and that appellants recover nothing by their suit. (R. 63.)

Notice of appeal from this judgment was filed by appellants on April 13, 1955 (R. 65), in compliance with 28 U.S.C., Section 2107. Jurisdiction of this Court to hear and determine this appeal is conferred by 28 U.S.C., Sections 1291 and 1294, as amended by the Act of October 31, 1951, c. 655, 65 Stat. 710, 726, 727, Sections 48 and 50(a).

QUESTIONS PRESENTED

1. Whether or not a genuine issue exists under the record as to any material fact.

2. Whether as a matter of law the appellees-employers were required to pay to the Government of Guam sums distrained and withheld from taxpayers' wages.

3. Did the last minute amendment to the complaint defeat the motion for summary judgment?

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set forth in the Appendix, *infra*.

STATEMENT

For the sake of clarity the plaintiffs-appellants are designated below as "taxpayers" and the defendants-appellees as "employers."

The complaint and amended complaint are substantially identical with the exception that the amended complaint adds a fourth count to the three counts of the original complaint.

The first count of both complaints is on behalf of taxpayer Lamkin and alleges that he was employed in 1952 under a contract by the employers to work on their project in Guam, that this contract continues in full force and that this taxpayer has fulfilled and continues to fulfill all the obligations of the contract. (R. 4, 54-55.) [1]

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[1] The complaint here differs in immaterial detail from the amended complaint. The complaint alleges that the employment contract was executed at Ft. Collins, Colorado, in the month of December, 1952, and that taxpayer Lamkin was employed as an assistant mechanical superintendent to work in Guam. (R. 4.) The amended complaint alleges that the employment contract was executed at Denver, Colorado, on September 17, 1952, employing Lamkin as machinist general foreman to work in Guam. This contract was modified effective January 26, 1953, to read that this taxpayer was employed as an assistant office manager. (R. 54-55.)

Taxpayer Lamkin's gross income under the contract is $184 a week; after certain authorized deductions the net weekly balance to be paid to him is $142.54. (R. 4, 55.) In asserted violation of the contract the employers failed and refused to pay him the net balance of his wages for the weeks ending September 26, October 3, October 10 and October 17, 1954, in the total of $573.16; on October 27, 1954, he was paid $68.90, leaving a balance of $504.26 claimed to be due and unpaid to him. (R. 4-5, 55-56.) Prior to the time the employers failed to make these payments to taxpayer Lamkin, he had received by mail numerous demands "purporting to be assessments of an income tax from one Harry L. Mangerich, claiming to be Commissioner of Revenue and Taxation for the Government of Guam, said demands being for the sum of Four Hundred Eighty Seven Dollars Fifty One Cents ($487.51) plus interest." (R. 5, 56.) It is also alleged that the employers claimed to justify their purported violation of the contract terms by asserting that levies had been made by Mangerich on behalf of the Government of Guam upon taxpayer Lamkin's wages for income tax alleged to be due to the Government of Guam. (R. 5, 56-57.) Taxpayer Lamkin further avers in this first count that the purported levy by Mangerich is not authorized "by the Revenue Act of 1939 As Amended or the Revenue Act of 1954 of the United States or by any other statute of the United States" (R. 6); that taxpayer Lamkin is not indebted to the Government of Guam and has not authorized the employers to pay any money to Mangerich or the Government of Guam in his behalf; that the employers are indebted to taxpayer Lamkin in the sum of $504.26 which they refuse to pay

"by reason of said purported assessment and levy" (R. 6, 57).

In the second count taxpayer Silvia alleges that he is employed by the employers pursuant to a contract still in force executed in November, 1948, to work on their project in Guam in a supervisory capacity, and that he has and continues to perform all his contract obligations. (R. 6-7, 57.)[2] It is alleged that taxpayer Silvia's gross income under the contract is $146.65 a week which, after certain authorized deductions are made, leaves $109.65 to be paid him every week (R. 7, 57-58); that he is informed that the employers will on November 3, 1954, in violation of his employment contract, "confiscate" $109.65, being his net wages, and further that the employers on November 10, 1954, will "confiscate" the same amount and on November 17, 1954, an undetermined sum (R. 7-8, 58). Taxpayer Silvia avers that he is informed that the employers intend "to pay such sums so confiscated from his wages to one Harry L. Mangerich, an employee of the Government of Guam, by reason of purported assessments and levies made by the said Harry L. Mangerich and served upon defendants" (R. 8, 58); that taxpayer Silvia is not indebted to the Government of Guam or Mangerich or to the employers in any amount, that he has no adequate remedy at law "to prevent the total confiscation and dissipation of his wages as set forth above" (R. 8, 58-59); that unless the employers are

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[2] The complaint here differs in immaterial detail from the amended complaint. The complaint alleges that the contract was executed at San Francisco, California, in the month of November, 1948 (R. 6), which the amended complaint corrects to read as executed at Amesbury, Massachusetts, on November 15, 1948 (R. 57).

enjoined from "performing the acts of confiscation hereinabove described, plaintiff will be deprived of the fruits of his labor without due process of law" (R. 8, 59).

The third count is by both taxpayers and others similarly situated. It alleges that since January 1, 1951, the employers have withheld various sums from the wages of taxpayers and other employees of the employers and will withhold such sums in the future in accordance with withholding tables "provided in Section 1622(a)-(d), (g)-(k) of the United States Revenue Act of 1939 As Amended and Section 3402 of the United States Revenue Act of 1954, said withholding not having been authorized by plaintiffs."[3] (R. 9, 59.)

It is asserted that this withholding is contrary to "Section 1621 of the United States Revenue Act of 1939 As Amended" (R. 9, 59-60) and "Section 3401 of the United States Revenue Act of 1954" (R. 9, 60). It is also alleged that by reason of these "wrongful" acts of the employers (R. 9, 60), taxpayers and others have had and will have substantial sums unlawfully withheld from their wages and since numerous employees of the employers have been subjected to these purportedly wrongful and illegal withholdings, a multiplicity of suits to protect and secure their rights would be required and therefore taxpayers and others have no adequate remedy at law (R. 9, 60).

The fourth count is contained only in the amended complaint and is on behalf of both taxpayers and others similarly situated. It commences by realleging all the

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[3]The amended complaint adds "except for taxes to be withheld and paid to the United States of America." (R. 59.)

allegations of the first and third counts and adds that the employers (R. 60-61)—

> conspiring with one Harry L. Mangerich, who claims to be a duly appointed Commissioner of Revenue and Taxation of the unincorporated territory of Guam, and other officials of the Government of Guam unknown to plaintiffs, did wilfully deprive plaintiffs and others of a civil right guaranteed to them by the Constitution and laws of the United States of America and the Organic Act of Guam, to wit: their property has been confiscated without due process of law contrary to the express provisions of Title 26, U.S.C.A.; that defendants, acting in concert with the said Harry L. Mangerich and others, under color of statutory law and regulations of the United States of America and the unincorporated territory of Guam, did deprive plaintiffs and others of their property and right to property as hereinbefore alleged, to the damage of each plaintiff in the sum of Twenty Five Thousand Dollars ($25,000.00).

On the basis of these four counts taxpayers demand the following relief: Taxpayer Lamkin demands money judgment for $504.26 with interest and for $25,000 and for an injunction restraining further alleged confiscation of his wages and further withholdings from his wages and those of others and that the employers be required to account for and repay to taxpayer Lamkin and others sums withheld from their wages since January 1, 1951. (R. 9-10, 61-62.)

Taxpayer Silvia demands money judgment for $25,000 and that the employers be enjoined from confiscat-

ing his wages as threatened and from further withholdings from his wages and those of others and that the employers be required to account for and repay to him and others sums withheld from their wages since January 1, 1951. (R. 10, 62.)

The employers did not answer the complaint, but instead moved (1) to dismiss the action because the complaint fails to state a claim upon which relief can be granted and (2) to enter summary judgment for the defendants on the ground that the complaint and an affidavit attached to the motion show that there is no material question of fact before the court and that the employers are entitled to judgment as a matter of law. (R. 12-13.) The affidavit attached to the motion for summary judgment was made by J. Russell Marshall who states that since April 1, 1954, he has been employed by the employers as "Project Manager," and as such is in charge of the management of the employers' affairs in Guam; that the exclusive activity of the employers within Guam is the construction of military installations upon military reservations pursuant to a cost-plus-fixed-fee contract between the employers and the Department of the Navy (R. 14); that of thousands of persons employed for this purpose, the employers employed taxpayer Lamkin on September 17, 1952, at Denver, Colorado, by a written contract, which was modified in writing on January 24, 1953 (R. 14-15). Copies of the contract of employment and its modification are annexed to Mr. Marshall's affidavit marked Exhibit A (R. 19-33) and Exhibit B (R. 33-37). Mr. Marshall further deposes that, at all times during taxpayer Lamkin's employment, the employers have "regularly deducted income tax withholdings as pro-

vided by the United States Internal Revenue Codes and Regulations and has paid such sums withheld over to the Treasurer of the Government of Guam," and that "the employer has followed a like procedure covering Guam earnings in the instance of all other employees employed on Guam under the same or similar conditions." (R. 15.) Exhibit C attached to the affidavit is a copy of a withholding exemption certificate executed by taxpayer Lamkin, dated November 20, 1952. (R. 37-38.)

Mr. Marshall's affidavit further sets forth that on September 1, 1950, the employers entered into a similar written contract of employment with taxpayer Silvia, a copy of which, attached to the affidavit, is marked Exhibit D. (R. 15, 38-40.) A withholding exemption certificate was executed by taxpayer Silvia dated December 15, 1950, attached as Exhibit E. (R. 40-41.)

The affidavit continues that on September 30, 1954, a warrant for distraint and levy covering taxpayer Lamkin's wages was served on the employers setting forth that taxpayer Lamkin was indebted to the Government of Guam for unpaid income taxes in the sum of $503.35 and pursuant thereto the employers distrained $142.54 from wages then due and owing to taxpayer Lamkin. (R. 16.) A copy of this warrant for distraint and levy is annexed to the affidavit marked Exhibit F. (R. 41-43.) Mr. Marshall further deposes that on October 7, 1954, the employers were served with a subsequent levy by the Commissioner of Revenue and Taxation for the Government of Guam in the amount of $361.22 pursuant to which the employers distrained $145.54 from taxpayer Lamkin's wages. (R. 16-17.) A copy of the warrant for distraint and

levy attached to the affidavit is marked Exhibit G. (R. 44-46.) Similar levies were made on October 14 and 22, 1954, copies of which are attached to the affidavit as Exhibits H and I. (R. 17, 46-48.) The total amount distrained by reason of these warrants and levies was $573.16, from which however the employers have been authorized by the Commissioner of Revenue and Taxation to release $68.90. Accordingly, the employers have paid over to the Government of Guam the net amount of $504.26. (R. 17.)

At a time subsequent to the filing of the instant suit, namely, on November 18, 1954, the employers were served with a warrant for distraint and levy by the insular Commissioner of Revenue and Taxation setting forth that taxpayer Silvia was indebted to Guam in the amount of $221.66 and pursuant thereto distrained $89.50 from wages then due him. (R. 17-18.) A copy of this warrant and levy is attached as Exhibit J. (R. 48-51.) Other levies were served on the employers by the Commissioner of Revenue and Taxation on November 26, and December 2, 1954, respectively, copies of which are attached to the affidavit as Exhibits K and L. (R. 18, 51-53.) In compliance with these warrants for distraint and levies the employers in all distrained and paid over to the Government of Guam the total sum of $221.85. (R. 18.)

The affidavit concludes that the employers have been advised and verily believe that their actions in the premises were lawful and in response to lawful authority and that they intend to continue so to act until such time as they are by law commanded to act otherwise. (R. 18-19.)

The motion for summary judgment, Mr. Marshall's

attached affidavit and the exhibits forming part of the affidavit were all filed and served on February 17, 1955. (R. 53, 69.) Notice that the motion would be brought on for hearing on March 4, 1955, with acknowledgement of service attached was also filed on February 17, 1955. (R. 53, 69.) On the day preceding the hearing, namely on March 3, 1955, taxpayers filed the amended complaint. (R. 62, 69.) The hearing was held on March 4, 1955, and the motion for summary judgment granted. (R. 71-80.) The court found that the employers were entitled to summary judgment as a matter of law and entered judgment on March 15, 1955, in their favor and that taxpayers recover nothing by their suit. (R. 63.) The instant appeal followed. (R. 65.)

SUMMARY OF ARGUMENT

1. The record establishes that no genuine issue exists as to any material fact. There is no dispute as to the employment contracts, performance of personal services by taxpayers in Guam, the amounts owed to taxpayers for wages under the contracts, the part of these wages which were withheld and paid to the Government of Guam, the receipt of the warrants for distraint and levies and the payments in response to these made by the employers to the Government of Guam. The only question remaining is whether or not the employers were correct in concluding that these payments to the Government of Guam were required as a matter of law.

2. Taxpayers do not complain that the amount of tax distrained and withheld from their wages is more than the statute requires or is otherwise incorrect. Their claim is solely and completely that there is no territorial income tax as a matter of law and hence that no valid collections could have been made under it.

However, in thus contending taxpayers choose to ignore the recent decision of this Court which directly rules adversely to their position here. *Laguana* v. *Ansell,* 212 F. 2d 207, affirming *per curiam* the decision of the District Court of Guam for the reasons given in its opinion (102 F. Supp. 919), certiorari denied, 348 U.S. 830. In substance taxpayers' effort here is to obtain a holding by this Court overruling its recent decisions directly in point. The *Laguana* case correctly holds that Congress intended persons such as taxpayers, who earn income for personal services on Guam, to pay an income tax imposed by Sections 30 and 31 of the Organic Act of Guam to sustain the territorial Government within whose jurisdiction and under whose protection the income is derived.

Further support for this construction of Section 31 of the Organic Act, adopted by this Court in the *Laguana* case and by the court below here is supplied by its legislative history and administrative construction and by the legislative history and long-standing administrative construction of substantially identical provisions for the Virgin Islands from which Section 31 derives.

Secton 31 was obviously designed to change the prior law. Under taxpayers' argument, however, there would be no change; a citizen and resident of Guam deriving all his income from personal services rendered in Guam would remain free from income tax. The purpose in imposing the territorial income taxes both in Guam and in other possessions has been to assist the possession in becoming self-sustaining. The income tax in Guam, administered and collected as a territorial tax by the territorial authorities since January 1, 1951, has resulted

in substantial tax collections and has brought about the result desired by Congress of enabling the territory to support its own Government and to make it unnecessary for Congress to appropriate funds of the United States for the support of Guam.

Although this Court definitely ruled in the *Laguana* case that the tax is territorial and not federal and is to be collected by the officers of the Government of Guam, taxpayers here insist that the warrants for distraint, levies and withholdings were not issued and made by officers authorized to administer and collect the tax. This amounts merely to a restatement of taxpayers' primary position that allegedly the income tax imposed by Section 31 of the Organic Act is not a territorial tax, from which they deduce as a corollary the proposition that it may not be administered by territorial officials. Taxpayers make no showing whatsoever that Harry L. Mangerich, who issued the warrants and levies as Commissioner of Revenue and Taxation of Guam is not, indeed, the Commissioner of Revenue and Taxation for Guam and that the Commissioner of Revenue and Taxation is not the proper officer authorized to issue warrants for distraint and make levies. The vague conclusions contained in taxpayers' complaint are ineffective to overcome the well recognized presumption of regularity, which attaches to official proceedings and acts. Taxpayers offered no proof by affidavit or otherwise in opposition to the motion for summary judgment. Mere general allegations which do not show the facts in detail are insufficient to prevent the awarding of summary judgment. In a small community such as Guam the District Court, in any event, was warranted in taking judicial notice of the existence of the office of Commissioner of Revenue and Taxation

and of the individual who is the incumbent of that office.

Moreover, the Organic Act fully vests the executive authority of the Government of Guam in the Governor, who is directed faithfully to execute the laws of the United States applicable to Guam and the laws of Guam. The executive authority of the Government of Guam possesses inherently, like the executives of other English and American commonwealths, the power to authorize summary and distraint proceedings for collection of taxes due. Besides, under the terms of Section 31 of the Organic Act the appropriate provisions of the Internal Revenue Codes of 1939 and 1954 authorizing the issuance of distraint warrants and levies are incorporated by reference and would here apply.

3. The District Court correctly held that the amendment to the complaint by the addition of the fourth count did not defeat the motion for summary judgment. Such a motion is not addressed to the pleadings and is not disposed of by mere amendment of the pleadings. A court, upon taking into consideration the allegations of the amended pleading, may find that nevertheless no material issue of fact is raised, and that the moving party is entitled to a judgment as a matter of law. Here the District Court carefully considered the amended complaint and correctly ruled that the addition at the last moment of the fourth count added nothing to the basic issues and was insufficient to constitute a defense to the summary judgment motion.

ARGUMENT

Introductory

The defense of this action both in the District Court and this Court on behalf of the defendants-appellees-employers is undertaken by the United States Department of Justice and its officers because the employers are contractors with the United States and under the contract terms there exists the possibility that the United States would become ultimately liable to satisfy any judgment rendered against the employers instantly. Moreover, in the leading precedent in this field, *Laguana* v. *Ansell,* 102 F. Supp. 919 (Guam), affirmed by this Court for the reasons given in the District Court's opinion, 212 F. 2d 207, certiorari denied, 348 U.S. 830, the United States intervened as a party both at the trial and on appeal to support the proposition, which that case established, that Section 31 of the Organic Act of Guam (Appendix, *infra*) imposes a territorial tax to be collected by the proper officials of the Government of Guam. It is apparent that taxpayers seek here once more to attack this identical proposition and that their essential position is based on a denial of its correctness, despite the recent ruling of this Court to the contrary.

We are informed that the Government of Guam through its Attorney General will file a brief *amicus curiae* in support of the appellees-employers' position.

I

The Record Establishes That No Genuine Issue Exists as to Any Material Fact

Despite numerous vague and conclusory statements throughout their brief to the effect that a substantial

fact issue exists under the instant record, taxpayers make the concession quoted *infra,* which we submit plainly establishes that the court below was correct in holding, "that there are no issues of fact that remain in the controversy and upon which the court must pass." (R. 78.) Thus in their brief (p. 41) taxpayers expressly concede:

> Appellees caused to be filed in support of their motion to dismiss and for summary judgment an affidavit of Mr. Marshall, together with supporting exhibits. *Appellants concede that Mr. Marshall did accurately relate clearly and correctly all the facts which are material.* The status of the appellees within Guam, their work, the employment of appellants, the receipt of the levies and warrants of distraint, their withholding of pay as authorized by United States tax withholding forms executed by appellants, and the turning over to agents of the Government of Guam of the sums withheld from appellants' pay upon the demand of agents of Guam.
>
> *Appellants concede that the alleged warrants of distraint, the levies, their employment contracts and United States withholding forms are correct.* [Italics supplied.]

Indeed, taxpayers are hardly in a position to avoid this concession for the facts sworn to by Mr. Marshall in his affidavit in support of the employers' motion for summary judgment do not differ in material substance from those alleged in the complaint. As appears from the Statement, *supra*, both the complaint, amended complaint, and the affidavit in support of the summary

judgment motion unite in their statements respecting taxpayers' employment by the appellee—employers, the terms of their contracts, the amounts owed to taxpayers for wages under the contracts, the part of these wages, which were paid to the Government of Guam, the service of the warrants of distraint and the levies issued under the authority of the Government of Guam, and the employers' assertions that the payments and withholdings were made in response to lawful authority.

Accordingly, the only question remaining is whether or not the employers were correct in concluding that these payments to the Government of Guam were required as a matter of law. This issue plainly constitutes an issue of law and is the only issue presented by the record and the record clearly discloses that there is no genuine issue as to any material fact.

Indeed, taxpayers' own statement in their brief of the matters, about which they do not agree with the affidavit of Mr. Marshall, demonstrates that the only issue presented by this case is one of law, as follows (Br. 41):

> Appellants do not concur in the conclusion of the affidavit, that the action of appellees *was lawful,* that it was *in response to lawful authority,* or that there is any *justification in law* for the actions of appellees. [Italics supplied.]

II

The Employers Were Required as a Matter of Law to Pay to the Government of Guam the Sums Distrained and Withheld from Taxpayers' Wages

A. First of all it is to be stressed that taxpayers make no claim whatsoever that the amount of tax distrained

and withheld from their wages was incorrect, provided the territorial tax is a valid and subsisting tax; they do not assert that the amount collected is more than the statute imposes or that it was collected for the wrong year or in any other way is improper under the law. Their claim is solely and completely that the territorial income tax is as a matter of law, not a valid and subsisting exaction. Even a cursory analysis of the complaint and amended complaint demonstrates this.

However, in thus contending taxpayers choose to ignore the recent decision of this Court which directly rules adversely to their position here. *Laguana* v. *Ansell,* 212 F. 2d 207, decided April 15, 1954. This Court there affirmed the District Court of Guam for the reasons given in the opinion of the District Court in that case. In that opinion the District Court pointed out (102 F. Supp. 919-920):

> This is a test action brought by the plaintiff, hereinafter called the taxpayer, to determine what construction should be placed upon Sections 30 and 31 of the Organic Act of Guam 64 Stat. 392, 48 U.S. C.A. §§ 1421h and 1421i.

Further, in its opinion, upon which this Court affirmed, the District Court held (p. 921):

> It seems to me that it is little more than vagrant intellectual exercise to assume that in these days of great challenge to the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Federal tax, in this unincorporated territory. Even

> the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A. §§251 and 252.

The District Court's conclusion was (p. 922) "I hold that the effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam." The Supreme Court denied taxpayers' application for certiorari from the decision of this Court in the *Laguana* case (348 U.S. 830, October 14, 1954).

In substance taxpayers' effort here is thus to obtain a holding from this Court overruling one of its recent decisions directly in point; nevertheless, their brief in all of its sixty-two pages never once cites the *Laguana* case, but in bland silence hopes to consign it to a disingenuous oblivion. The *Laguana* case plainly and correctly holds that Congress intended persons such as taxpayers who earn income for personal services on Guam to pay an income tax to sustain the territorial Government within whose jurisdiction and under whose protection the income is derived.[4]

Further support for the plainly sensible construction of Section 31 of the Organic Act adopted by this Court in the *Laguana* case and by the court below here is supplied by the legislative history and long standing administrative construction of the substantially identical provision for the Virgin Islands from which Section 31

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[4] See the legislative history of Sections 30 and 31 recited in the District Court's opinion in the *Laguana* case (pp. 920-921); also 96 Cong. Record, Part 6, pp. 7574-7577.

derives. This provision, quoted in the margin,[5] was explained as providing for local imposition upon the inhabitants of the Virgin Islands of a territorial income tax, payable directly into the Virgin Islands' treasury, to assist that possession in becoming self-supporting.[6] The enactment was recommended as following the precedent of earlier legislation applying to Puerto Rico and the Philippines.[7]

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[5] Naval Appropriations Act of July 12, 1921, c. 44, 42 Stat. 122, 123, Sec. 1 (48 U.S.C. 1952 ed., Sec. 1397):

> * * * the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

Indeed, under Section 28(a) of the Revised Organic Act of the Virgin Islands, enacted July 22, 1954, c. 558, 68 Stat. 497, 508 (48 U.S.C. 1952 ed., Supp. II, Sec. 1642 (a)), inhabitants of the Virgin Islands presently pay their tax on income from all sources both within and outside the Virgin Islands into the treasury of the Virgin Islands.

[6] 61 Cong. Record, Part 2, p. 1724; 61 Cong. Record, Part 3, p. 3173.

[7] Indeed, without exception, for a period of over forty years, from the very inception of the income tax, whenever Congress has imposed the tax in a possession, Congress invariably has directed its collection by officers of the possession and its payment directly into the treasury of the possession. Thus, as to the Philippines and Puerto Rico, see Income Tax Act of 1913, c. 16, 38 Stat. 114, 166-181, Sec. II, M; Revenue Act of 1916, c. 463, 39 Stat. 756, Sec. 23. During the period the Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 261, was in force, Congressionally imposed separate income tax systems for those possessions, on the one hand, governed by the provisions and rates of the Revenue Act of 1916, and for the United States, on the other hand, governed by the 1918 Act, were in effect. *Lawrence* v. *Wardell*, 273 Fed. 405 (C.A. 9th); *Robinette* v. *Commissioner*, 139 F. 2d 285 (C.A. 6th); *Helvering* v. *Campbell*, 139 F. 2d 865 (C.A. 4th). Congress was there acting as a local legislature for the territory. *Lawrence* v. *Wardell*, *supra*, pp. 408, 409. By the Revenue Act of 1917, c. 63, 40 Stat. 300, Sec. 5, and the Revenue Act of 1918, *supra*, Sec. 261, Congress empowered the

The purpose shown in the 1921 legislation for the Virgin Islands, as in its counterpart here involved, has been consistently implemented by both the federal and territorial taxing authorities, who have recognized that Congress created a local, locally collectible income tax and that the United States and the Virgin Islands are distinct taxing jurisdictions although their income tax laws arise from an identical statute applicable to each. Carefully considered and reasoned Internal Revenue rulings, the first of which was issued twenty years ago, announce this result. I.T. 2946, XIV-2 Cum. Bull. 109 (1935); I.T. 3690, 1944 Cum. Bull. 164. The correctness of this official interpretation and practice appears never to have been questioned, and the income tax has been administered in the Virgin Islands in accordance with this construction for over a generation. Such settled administrative constructions, applied in thousands of cases over an extended period, are of course entitled to great weight. *Brewster* v. *Gage,* 280 U.S. 327, 336; *Fawcus Machine Co.* v. *United States,* 282 U.S. 375, 378; *Dismuke* v. *United States,* 297 U.S. 167, 174; *United States* v. *Amer. Trucking Ass'ns,* 310 U.S. 534, 549; *Roland Co.* v. *Walling,* 326 U.S. 657, 676; *Corn Products Refining Co.* v. *Commissioner* (Sup. Ct.) decided November 7, 1955 (1955 C.C.H., par 9746).

By duplicating in Section 31 of the Organic Act of Guam the provision in the Naval Appropriations Act of 1921 for the Virgin Islands (*supra*, fn. 5) Congress in effect adopted the established administrative interpretation of the latter statute, i.e., that it creates a

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legislatures of Puerto Rico and the Philippines to amend or repeal the Congressionally imposed local income taxes, powers which both insular legislatures exercised in 1919. Like authority has thus far not been granted the Virgin Islands or Guam.

territorial tax on the locally earned income. This is the construction approved by this Court in the *Laguana* case and by the court below here, which the Treasury repeatedly has placed upon Section 31. I.T. 4046, 1951-1 Cum. Bull. 57; Rev. Rul. 8, 1953, 1953-1 Cum. Bull. 300, 301; Rev. Rul. 56, 1953-1 Cum. Bull. 303; Rev. Rul. 55-184, 1955-13 Int. Rev. Bull. 39, 1955-47 Int. Rev. Bull. 18.

As appears from these rulings and holdings, Sections 251(a) and 252 of the 1939 Internal Revenue Code provide an exemption from the federal tax, avoiding double taxation of income earned in Guam, but have no application to the subsequently created territorial tax under Section 31 of the Organic Act. This finds additional confirmation in the 1954 Internal Revenue Code, whose Sections 931(a) and 932, while otherwise substantially identical with 1939 Code Sections 251(a) and 252, contain in Section 932(c) specific reference to the applicability of United States income tax laws in Guam under Sections 30 and 31 of the Organic Act (Appendix, *infra*). For the same reasons that the cited sections of the 1939 and 1954 Code do not apply to the territorial tax created under Section 31 of the Organic Act—contrary to taxpayers' repeated contentions (Br. 17, 27, 32)—1939 Code Section 1621(a)(8)(B)[8] providing an exemption from collection of the federal tax by withholding, where at least 80 per cent of the wages are paid for services rendered in a possession, has no application to the territorial tax. Congress plainly intended persons living and earning income from personal services in Guam, like taxpayers, to be subject to income taxation and to its collection by withholding to

[8] 1954 Code Section 3401(a)(8)(B) is substantially identical.

support the newly set up local government. The statute itself and every bit of evidence as to why it was written refute a contrary construction. It is noteworthy that the taxes, refund of which were denied in the *Laguana* case, had been for personal services rendered, collected by withholding.

Section 31 was obviously designed to change the prior law. On taxpayer's argument, however, there would be no change; a citizen and resident of Guam deriving all his income from personal services rendered in Guam would remain free of income tax. The argument is without substance.

According to information submitted by the Director of Finance of Guam to the Attorney General of Guam, the income tax in Guam, administered and collected as a territorial tax by the territorial authorities, has resulted in total collections under Section 31 from January 1, 1951, the date it became operative, to November 30, 1955, in the amount of $15,569,221, in addition to $18,375,198, transferred to Guam under Section 30 by the United States Treasury. These collections have been made from a total population of approximately 72,000.

Further, principally as a consequence of these income tax receipts, Congress has found it unnecessary to appropriate funds of the United States for support of the Government of Guam except the minor items expressly assumed in the Organic Act, such as expenses of the Governor's office and of the legislature, and certain transportation expenses. Section 26(a), (b), (c) and (e). In contrast, prior to the inception of the tax, for the fiscal year ending June 30, 1951, Congress found it

necessary to grant $1,200,000 to the Department of the Interior for the administration of Guam.

Since the *Laguana* case[9] the following decisions pertinent to the instant issue have been rendered by the court below, all prior to its ruling in the instant case:

In *Wilson* v. *Kennedy,* 123 F. Supp. 156 (August, 1954), pending appeal to this Court, No. 14593, the plaintiffs were two employers and two employees of different employers; the defendants, sued as individuals, were the former Commissioner of Revenue and Taxation of Guam, the Governor, Attorney General and Director of Finance of Guam. The complaint alleged that the defendants, acting without authority, required the plaintiffs and others similarly situated to pay income taxes under Section 31 which were used by the Government of Guam. The plaintiffs requested judgment that the defendants repay the taxes alleged illegally to have been collected, be enjoined from future illegal collections and that a declaratory judgment be entered holding that there is no effective territorial income tax law in Guam. The District Court, in granting defendants' motion for summary judgment, held (pp. 158-159):

> The Laguana case disposed of any question as to the imposition of the tax and the obligation to pay the tax to the proper officials of the Government of Guam. The plaintiffs in the instant case apparently contend, however, that there are no officials of the

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[9] Prior to the *Laguana* decision this Court held in *Crain* v. *Government of Guam,* 195 F. 2d 414, that the Government of Guam has sovereign immunity from suit without its consent in a case where the plaintiffs sought a declaratory judgment of their rights under Section 31 of the Organic Act.

> Government of Guam who have authority to collect the tax and that those officials who pretended to exercise such authority must repay the amounts collected. In the first place we must distinguish between Section 31, which makes the income tax laws in force in the United States of America, current and future, in force in Guam, and any authority the Guam Legislature may have to legislate in the field. The United States Congress as the parent legislative body made the "income tax laws" applicable. We are dealing with a law of the United States. In this complex field it would appear that the Congress intended to do more than just levy taxes. It intended that the taxpayer on Guam should be governed by the income tax laws in force in the United States at any given time. Like the taxes themselves, enforcement of collection must necessarily vary or change at the will of the Congress. If the Government of Guam has available facilities to carry out that will, a taxpayer can hardly be heard to complain that he would prefer some different system of collection.

The issue in the instant case essentially does not differ from that in *Wilson* v. *Kennedy, supra.* Although taxpayers here repeatedly assert that the instant case is merely an action in breach of contract of employment between private employer and employee and not a tax case, nevertheless, whether or not the contract was broken depends upon whether or not the employers' payments to the Government of Guam out of the employees' salaries were in response to lawful authority and, hence, upon the validity of the income tax. Thus, the employers instantly maintain that under Section

1623 of the 1939 Code (Appendix, *infra*), (or its cognate 1954 Code Section 3403) as incorporated by reference in Section 31 of the Organic Act, they "shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment."

Again as to the payments made to the Government of Guam in response to the warrants for distraint and levies, if, as the employers contend, these were for taxes validly due, then it follows they were required by law and the taxpayers have no proper basis for complaint or ground for action. *Antrum* v. *United States,* 127 F. Supp. 54 (Conn.). Submittedly the *Laguana* case establishes that the taxes were validly due and the payments required by law.

In *Holbrook* v. *Taitano,* 125 F. Supp. 14 (October, 1954), the District Court of Guam dismissed for lack of jurisdiction a suit by a taxpayer to enjoin tax officials of the Government of Guam from enforcing the income tax imposed by Section 31 of the Organic Act and from requiring the taxpayer there to file returns under the Guam tax. The Court held that Sections 7421 of the 1954 Internal Revenue Code and 3653 of the 1939 Code prohibit any court from maintaining a suit for the purpose of restraining the assessment or collection of any tax. In *Phelan and Crain* v. *Taitano,* the District Court denied taxpayers' motion for a temporary injunction and granted the defendants' motion for dismissal for lack of jurisdiction. (November, 1954.) The District Court of Guam rendered no reported opinion. This action is similar to the *Holbrook* case and seeks injunctive relief of the same type. Consolidated

appeals to this Court from the orders of the District Court are pending (No. 14585).[10]

B. Just as taxpayers dispute the validity of the income tax imposition, so apparently do they seek to contest the authority of the officials of the Government of Guam to issue the warrants for distraint and levies. These warrants and levies were all signed by "Harry L. Mangerich, Commissioner of Revenue and Taxation." (R. 42, 43, 45, 46, 47, 48, 50, 51, 52.) As already noted, *supra,* taxpayers concede that warrants and levies so issued and so signed, copies of which are annexed to Mr. Marshall's affidavit, were received. (Br. 41.) However, in their complaint they referred to Mr. Mangerich as "claiming to be Commissioner of Revenue and Taxation for the Government of Guam." (R. 5, 56.) They state (R. 56-57):

> * * * that the said Harry L. Mangerich claims his authority stems from Section 31 of the Organic Act of Guam and that said Section 31 incorporates the Internal Revenue Code of the United States into said Organic Act of Guam; that by the construction of the said Harry L. Mangerich and others, officers of the Government of Guam, have the right to interpret, construe, administer and enforce said Internal Revenue Code of the United States.

See also R. 58, 60, 61.

The sworn statement of Mr. Marshall that the sums withheld and distrained from taxpayers' wages were

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[10] Taxpayers Phelan and Crain in the cited case also appeared as attorneys for the taxpayers in *Wilson* v. *Kennedy, supra; Holbrook* v. *Taitano, supra; Crain* v. *Government of Guam, supra,* and the instant case.

paid to the Government of Guam (R. 15, 17, 18) is not disputed. Indeed, in the complaint taxpayers refer to Mr. Mangerich as "an employee of the Government of Guam" (R. 58) and, as already pointed out, in their brief (p. 41) taxpayers concede that Mr. Marshall "did accurately relate" among others "the turning over to agents of the Government of Guam of the sums withheld from appellants' pay upon the demand of agents of Guam."

However, taxpayers in their brief (p. 42) assert that—

> they believe the plain text of the Organic Act of Guam does not create a local tax but does confer upon the territorial Government the proceeds of any Federal taxes derived from Guam, and that lacking any statutory authority or delegation no local official possesses any legal right, duty or authority to perform any actions in connection with income tax, and therefore, all acts of such officers as set forth in the affidavit of Mr. Marshall are unwarranted and constitute no valid defense to appellees.

This amounts merely to a restatement of taxpayers' oft reiterated primary position that the income tax imposed by Section 31 of the Organic Act is a federal—and not a territorial tax—from which they deduce as a corollary the proposition that it is to be administered by federal and not territorial officials.[11]

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[11] It has already been pointed out earlier in this Point II that taxpayers' argument here indicates they would claim exemption from any tax payment in case the tax is held to be federal, finding supposed support for such a contention in 1939 Code Sections 251 and 1621(a)(8)(B).

Nevertheless, this Court has definitely ruled in the *Laguana* case that the tax is territorial and not federal and is to be collected by the officers of the Government of Guam. See also the discussion in the opinion of the court below in *Wilson* v. *Kennedy, supra,* where the authority of the officers of Guam to collect the tax is directly sustained.

Except for vague and generalized averments in their complaint, taxpayers make no showing whatsoever that Mr. Mangerich is not the Commissioner of Revenue and Taxation for Guam and that the Commissioner of Revenue and Taxation is not the proper officer to issue warrants for distraint and make levies. As noted, taxpayers do not dispute that Mr. Mangerich is an agent or employee of Guam. The well-recognized presumption exists that public officials will discharge their duties honestly and in accordance with rules of law or, as otherwise stated, that a presumption of regularity attaches to official proceedings and acts. *Lieberman* v. *Van DeCarr,* 199 U.S. 552; *United States* v. *Fratrick,* 140 F. 2d 5, 7 (C.A. 7th). Mr. Mangerich's official actions then in issuing warrants and levies has attached to them the presumption of regularity, and the conclusions and vague characterizations implying the contrary in taxpayers' complaint are completely ineffective.

Taxpayers chose to rest upon their complaint and offered no proof by affidavit or otherwise in opposition to the motion for summary judgment, although notice of motion was served on February 17, 1955, and the hearing was not had until March 4, 1955. (R. 69.) Nor did taxpayers offer at the hearing to submit any proof that Mr. Mangerich, as Commissioner of Revenue and Taxation, was not authorized to perform the offi-

cial acts of distraint and levy which he did perform. The amended complaint served on the day before the hearing (R. 62) did not serve to impair in any way the employers' proof on the summary judgment motion and substantially added nothing to what previously had been before the Court. See Point III, *infra*. The holding of the Second Circuit in *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (C.A. 2d), is here entirely pertinent, as follows:

> Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. [Citing cases.]

Moreover, in *Gifford* v. *Travelers Protective Assn.*, 153 F. 2d 209, 211, this Court ruled:

> Where a defendant presents evidence on which it would be entitled to a directed verdict if believed and which the plaintiff does not discredit as dishonest, *it rests on the plaintiff, in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result.* [Italics supplied.]

If any possible ground existed to support a claim that Mr. Mangerich's official proceedings as Commissioner of Revenue and Taxation are not entirely authorized or proper, surely it was incumbent on taxpayers to specify any supposed opposing evidence upon which they rely. See also *Surkin* v. *Charteris*, 197 F. 2d 77, 79 (C.A. 5th).

In any event, surely the District Court in a small community, such as Guam, was warranted in taking judicial notice of the existence of the office of Commissioner of Revenue and Taxation and of the individual, who was the incumbent of that office. The Organic Act fully vests the executive authority of the Government of Guam in the Governor, who has power to appoint officers, who is directed faithfully to execute the laws of the United States applicable to Guam and the laws of Guam, and upon whom is conferred the power to issue executive regulations. Organic Act of Guam, Sections 6(a), (b) and (c) and 9(b) and (c) (Appendix, *infra*).

Moreover, among the income tax laws in force in the United States, which by Section 31 were held to be likewise in force in Guam, were Section 1622 of the 1939 Code making provision for collection of the income tax at source by withholding,[12] and Sections 3690, 3692 and 3710(a) and (b) of the 1939 Code (Appendix, *infra*) granting authority to distrain and levy and making provision for surrender of property subject to distraint.[13] In I.T. 4046, *supra,* pp. 58-59, it is said:

> I.T. 2946 (C.B. XIV-2, 109 (1935)) holds in part that the United States and the Virgin Islands are separate and distinct taxing jurisdictions although their income tax laws arise from an identical statute applicable to each. It is stated in that ruling that it will be necessary, in some sections of the law (Revenue Act of 1934), to substitute the words "Virgin Islands" for the words "United States" in order to give the law proper effect in those

[12] Section 3402 of the 1954 Code is substantially identical.

[13] Sections 6331 and 6332 of the 1954 Code contain substantially equivalent provisions.

islands. It is believed that the same principles are applicable to Guam in view of the above-mentioned provisions of the Organic Act of Guam.

On the same principle it is obviously proper in order to carry out the intent of Congress in Section 31 of the Organic Act to substitute for the words "the collector" or his "deputy" in Sections 3690, 3692 and 3710 of the 1939 Code and for "the Secretary or his delegate" in Sections 6331 and 6332 of the 1954 Code, the designation of the appropriate officer of the Government of Guam fulfilling like functions in its revenue system, namely, here the Commissioner of Revenue and Taxation. The court below applied this principle in the instant context in *Wilson* v. *Kennedy, supra.*

Moreover, from earliest times it has been recognized that the executive implicitly possesses the power by a summary seizure of property to enforce payment of tax debts owed to the state. At common law this procedure existed even prior to *Magna Charta.*[14] Apparently legislation served principally to ameliorate it. The Governor of Guam who, as already has been seen, is required to execute the laws of the United States ap-

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[14] Thus in the landmark case, *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 277, the Supreme Court said:

> We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. It is difficult, at this day, to trace with precision all the proceedings had for these purposes in the earliest ages in the common law. That they were summary and severe, and had been used for purposes of oppression, is inferable from the fact that one chapter of *Magna Charta* treats of their restraint.

See also *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596.

plicable to Guam and the laws of Guam, and upon whom is conferred the power to issue executive regulations and in whom is vested the executive authority of the Government of Guam, would, it is submitted, without more possess the authority to institute through the officers of Guam proceedings for distraint and levy in collection of taxes imposed by Congress as a territorial tax upon the inhabitants of Guam. Hence, even without application of Sections 3690, 3692, and 3710 of the 1939 Code (and their cognates under the 1954 Code), submittedly the Governor possesses the power through the agency of a subordinate official, in the exercise of the executive authority of the Government of Guam vested in him, to seize property in payment of taxes due Guam.[15]

In summary then, all which taxpayers actually have set forth is a legal conclusion that the instant tax is federal, not territorial, and allegedly therefore should not be administered by territorial officers. On this point the *Laguana* case directly rules against them. They have made no showing whatsoever that, assuming the tax is territorial, it was not administered by duly authorized territorial officials. They have in no way overcome the presumption of regularity attaching to the official proceedings concededly taken by the Commissioner of Revenue and Taxation. Under the terms of Section 31 of the Organic Act the appropriate

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[15] See also Sec. 5100 of the Government Code of Guam (1952), enacted by the Territorial Legislature which declares that—

> There is within the Executive Branch of the government of Guam a Department of Finance. The Director of Finance is the head of the Department of Finance. The Director of Finance is appointed by the Governor with the consent of the Legislature.

provisions of the Internal Revenue Code of 1939 and 1954 would apply, and in any event the executive authority of the Government of Guam possesses inherently, like the executives of other English and American commonwealths, the power traditionally to authorize summary and distraint proceedings for the collection of taxes due.

III

The District Court Correctly Held That the Amendment to the Complaint by the Addition of the Fourth Count Did Not Defeat the Motion for Summary Judgment

The motion for summary judgment and notice of hearing for the motion, as already pointed out, were served on February 17, 1955, returnable fifteen days later on March 4, 1955. (R. 53, 69.) Surely this was ample notice. Rule 56(c) (Appendix, *infra*) prescribes that the motion shall be served at least ten days before the time fixed for the hearing. Rule 56(c) also provides that the adverse party prior to the hearing date may serve opposing affidavits. Taxpayers served no opposing affidavits, but on March 3, 1955, filed their amended complaint. (R. 69.) Here (Br. 33-34), as on the hearing in the court below (R. 73), taxpayers insist that the mere filing of the amended complaint defeated the pending summary judgment motion. This contention is plainly incorrect as a matter of law. A summary judgment motion is not addressed to the pleadings and is not disposed of by a mere change or amendment of the pleadings. The primary purpose of a summary judgment motion is to pierce the allegations in the pleadings to show that no genuine issue of material fact is raised. An amended complaint served during such a

motion's pendency must be considered as is any other competent and pertinent paper. But it does not cancel out the motion nor prevent its consideration on the merits. If the court upon taking into consideration the allegations of the amended pleadings finds that, nevertheless, no material issue of fact is raised and that the moving party is entitled to a judgment as a matter of law, the mere technical amendment of the pleading will not prevent the granting of the motion and the allowance of summary judgment. As explained in 6 Moore's Federal Practice (2d ed.) 2056-2057—

> For if during the pendency of a motion for summary judgment, the adverse party amends his pleading as of course or is permitted to do so by the court, the amendment need not defeat the pending motion, unless the amendment is substantial and real and not a mere change in form.

See also *Kowalewski* v. *City of Hastings,* 112 F. Supp. 825 (Minn.), and *Gordon Corp.* v. *Cosman,* 232 N. Y. App. Div. 280, 284, 249 N. Y. S. 544, 548.

Here the District Court carefully considered the amended complaint and correctly ruled that it constituted no defense to the summary judgment motion. (R. 73-74, 78-79.) The allegations of the complaint and amended complaint have already been stated and it has been pointed out that the amended complaint differs only by the addition of the fourth count, which, after realleging the allegations of the first and third counts, adds that the employers, conspiring with Mr. Mangerich (who "claims" (R. 60) to be a duly appointed Commissioner of Revenue and Taxation of Guam), and other officials of Guam wilfully deprived

taxpayers and others of a civil right guaranteed to them by the Constitution of the United States and of the Organic Act of Guam, in that their property has been confiscated without due process of law and that (R. 61) under "color of statutory law and regulations" of the United States and Guam they deprived taxpayers and others of their property to the damage of each taxpayer in the sum of $25,000. Obviously this is merely a restatement of taxpayers' familiar claim that Section 31 of the Organic Act did not impose a territorial tax, which officers of Guam were authorized to collect. Since, as the employers contend and as this Court held in the *Laguana* case, the territorial tax is valid and subsisting as a matter of law, no right of action exists in taxpayers' favor by reason of the tax collection, and they have not been damaged in the amount of $25,000 apiece or in any other amount. Moreover, even if the tax is not territorial, but federal, it is difficult to perceive how taxpayers have been injured by deprivation of civil rights under (R. 54) "Chapter 21, Title 42, U. S. C. A.," as the amended complaint asserts. Neither by affidavit nor in their lengthy brief do they actually justify a claim of $25,000 damage or damage in any amount.

The fourth count of the amended complaint sets up no new facts which are substantial and is defective as a matter of law. Surely the District Court was warranted in characterizing this fourth court as "nothing more than a bombastic and unsupported series of generalizations" (R. 78) and in finding (R. 80) that—

> the addition at the last moment of the fourth count in the amended complaint adds nothing to the basic issues and it is insufficient to raise any question

under the civil rights statute of the United States; that the defendant's motion for summary judgment is valid.[16]

CONCLUSION

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1955.

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[16] Further demonstration of the artificiality of this last minute amendment of the complaint is seen in the following: Strangely, notwithstanding that by the time the amended complaint was filed, as Mr. Marshall's affidavit shows, Silvia's salary actually had been distrained and levied upon (R. 17-18), the amended complaint, filed March 3, 1955, still alleges that taxpayer Silvia "is informed and believes" (R. 58) that the employers—

> will, on the 3rd day of November, 1954, * * * confiscate the sum of One Hundred Nine Dollars Sixty Five Cents ($109.65), being the net balance due to plaintiff after deductions from his wages for the preceding week, and further, that defendants will, on the 10th day of November 1954, confiscate the sum of One Hundred Nine Dollars Sixty Five Cents ($109.65), and further, that on the 17th day of November, 1954, an undetermined sum will be confiscated from the wages of plaintiff by defendants.

and pleads (R. 59) that he "has no adequate remedy at law" and requests injunctive relief in March from acts that had occurred the preceding November and December.

APPENDIX

Organic Act of Guam, c. 512, 64 Stat. 384:

Sec. 3. Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act and shall have power to sue by such name. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct.

(48 U.S.C. 1952 ed., Sec. 1421a.)

Sec. 6 (a) The executive authority of the government of Guam shall be vested in an executive officer, whose title shall be "Governor of Guam", and shall be exercised under the supervision of the head of the department or agency referred to in section 3 of this Act. * * *

(b) The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. * * * He shall have the power to issue executive regulations not in conflict with any applicable law. * * *

(c) The Governor shall coordinate and have general cognizance over all activities of a civil

nature of the departments, bureaus, and offices of the Government of the United States in Guam.

(48 U.S.C. 1952 ed., Sec. 1422.)

Sec. 9. * * *

(b) The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law.

(c) The Governor shall, from time to time, examine the organization of the executive branch of the government of Guam, and shall determine and carry out such changes therein as are necessary to promote effective management and to execute faithfully the purposes of this Act and the laws of Guam.

* * * * *

(48 U.S.C. 1952 ed., Sec. 1422c.)

Sec. 30. All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for

the benefit and government of Guam in accordance with the annual budgets.

(48 U.S.C. 1952 ed., Sec. 1421h.)

Sec. 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam.

(48 U.S.C. 1952 ed., Sec. 1421i.)

Internal Revenue Code of 1939:

SEC. 1623 [17] [As added by Sec. 2(a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126] LIABILITY FOR TAX.

The employer shall be liable for the payment of the tax required to be deducted and withheld under this subchapter, and shall not be liable to any person for the amount of any such payment.

(26 U.S.C. 1952 ed., Sec. 1623.)

SEC. 3690. AUTHORITY TO DISTRAIN.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank

[17] Section 3403 of the Internal Revenue Code of 1954 is identical.

accounts, and evidences of debt, of the person delinquent as aforesaid.

(26 U.S.C. 1952 ed., Sec. 3690.)

SEC. 3692. LEVY.

In case of neglect or refusal under section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy.

(26 U.S.C. 1952 ed., Sec. 3692.)

SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.

(a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the

value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

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(26 U.S.C. 1952 ed., Sec. 3710.)

Federal Rules of Civil Procedure:

Rule 56. *Summary Judgment*

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(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) [As amended December 27, 1946] *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

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